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Recent Decisions

RECENT DECISIONS

CONFLICT OF LAWS — INSURANCE CONTRACTS — APPLICATION OF THE FORUM LAW

Johnston v. Commercial Travelers Mut. Acc. Ass'n (S.C. 1963)

Plaintiff, a resident of South Carolina, purchased a health and accident insurance policy from defendant, a New York corporation. The policy, mailed in New York and received in South Carolina, provided coverage of $10,000.00 for loss of one hand *and* one foot, or $5,000.00 for loss of one hand *or* one foot. The word *loss* was defined as actual severance at or above the wrist or ankle. The policy provided that the contract would be construed according to the laws of New York and also contained a two year statute of limitations. These provisions conflicted with the South Carolina Insurance Code. Section 37-141 provides that all contracts of insurance on property, lives or interest located in South Carolina are deemed made therein and subject to its laws, section 37-465 defines *loss* as including loss of the four fingers entire and section 37-474(11) provides for a six year statute of limitation on actions arising under health and accident policies.

Subsequently, plaintiff accidentally lost four fingers of his left hand and had his foot severed above the ankle. Plaintiff, having made claim, received defendant's draft for $5,279.00 as payment in full. Accompanying defendant's draft was a letter stating that the loss-of-hand benefit was payable only in case of amputation. Plaintiff later instituted suit for an additional $5,000.00 for the loss of a hand and $216.00 for medical benefits.

The question presented was whether South Carolina law was applicable to determine the rights of parties under an insurance contract issued by a foreign corporation not licensed to do business within the state. The trial court, in directing a verdict for the defendant, held that the contract was entered into in the State of New York and was to be construed in accordance with the laws of that State. On appeal, the Supreme Court held that in light of the statute providing that contracts of insurance on property, lives or interests located in state are deemed made therein and subject to its insurance laws, it was immaterial where the contract was technically entered into, when South Carolina has sufficient connection

with the contract that public policy demands that it conform with the requirements of the Insurance Code. *Johnston v. Commercial Travelers Mut. Acc. Ass'n*, ____ S.C. ____, 131 S.E.2d 91 (1963).[1]

No area in the conflict of laws is more uncertain than that of contracts.[2] The greatest divergence in this area occurs in determining the essential validity of a contract.[3] Decisions as to the validity of a contract have generally been classified into three rules,[4] each of which has been followed as well as criticized.

The first rule is that the law of the place where the contract was made (*lex loci contractus*) determines its validity.[5] This approach affords a single and ascertainable set of laws to govern the contract; however, the place where the contract was made may have only a casual connection with a contract, performance of which is to occur elsewhere.

The second rule makes the law of the place of performance controlling.[6] While this approach provides a more substantial connection with the transaction than does *lex loci contractus*, the difficulty is that often the contract calls for performance in two or more states. The third rule permits the intention of the parties to fix the law governing the contract.[7] While this appears practical, more often than not, the intent of the parties is not readily ascertainable, thus the courts are required to

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1. The court also held that the defendant's draft for $5,279.00 was payment of the undisputed claim for the loss of the plaintiff's foot.

2. See Lorenzen, *Validity and Effect of Contracts in the Conflict of Laws*, 30 YALE L.J. 565 (1920-1921).

3. See CARNAHAM, CONFLICT OF LAWS AND LIFE INSURANCE CONTRACTS, §11 (1958). For a discussion of four different rules considered by the New York Courts in reaching a decision, see Jones v. Metropolitan Life Ins. Co., 158 Misc. 466, 286 N.Y.S. 4 (1936).

4. See generally LEFLAR, CONFLICT OF LAWS §132 (1959); GOODRICH, CONFLICT OF LAWS §110 (1949); Beale, *What Law Governs the Validity of a Contract*, 23 HARV.L.REV. 260 (1907).

5. This rule is generally asserted by the courts in determining the validity of insurance contracts. See LENHOFF, CONFLICT AVOIDANCE IN INSURANCE, 21 LAW AND CONTEMPORARY PROBLEMS, 549 (1956). For a definition of the place where the contract was made as being the place in which the principal event necessary to make a contract occurs, see RESTATEMENT, CONFLICT OF LAWS §311 (d) (1934).

6. See *e.g.*, Beck v. Downey, 191 F.2d 150, 152 (9th Cir. 1951) vacated per curiam on other grounds, 343 U.S. 912, 96 L.Ed. 1328 (1952); GOODRICH, *op. cit. supra* note 4 at §110.

7. See Liverpool & Great W. Steam Co. v. Phenix Ins. Co., 129 U.S. 397, 32 L.Ed. 788 (1889); Siegelman v. Cunard White Star, Ltd., 221 F.2d 189 (2d Cir. 1955); Duskin v. Pennsylvania-Central Airlines Corp., 167 F.2d 727 (6th Cir. 1948).

infer from the surrounding circumstances an "implied" or "hypothetical" intent.[8]

The latest position taken by the courts in choosing the controlling law is that which has been termed the "center of gravity" or the "grouping of contacts" theory. Under this theory, the law of the place with the most significant contacts governs, as that state is presumed to have the greatest interest in the matter in dispute.[9] This position was first taken by the Indiana Supreme Court, which stated " . . . the court will consider all acts of the parties touching the transaction in relation to the several states involved and will apply as the law governing the transaction the law of that state with which the facts are in most intimate contact."[10]

The leading New York case of *Auten v. Auten*,[11] in a departure from the orthodox rules, held New York law applicable under the "center of gravity" theory. However, the *Auten* case dealt with performance of a separation agreement, leaving open the question of whether such theory could be used in determining the validity of a contract. The matter was finally put to rest in the Second Circuit by *Zogg v. Penn Mut. Life Ins. Co.*[12] The question before the court was whether New York's insurance law could be applied to a Massachusetts insurance policy. The application of New York law would have nullified a provision in the policy limiting death benefits to a return of the premiums in the event of the insured's suicide. Such a provision was valid under the laws of Massachusetts, the state in which the court assumed the contract to have been made. The court finding the rule as expressed in *Auten*[13] to be one of general application, held that New York law would govern, rendering the limitation ineffective. In reaching its decision, the court stated that "[U]nder the circumstances, a New York court could only conclude from

8. See Harper, *Policy Bases on the Conflict of Laws; Reflections on Rereading Professor Lorenzen's Essay*, 56 YALE L.J. 1155, 1164 (1946-1947); Nussbaum, *Conflict Theories of Contracts, Cases versus Restatement*, 51 YALE L.J. 893, 896 (1941-1942).

9. Zogg v. Penn Mut. Life Ins. Co., 276 F.2d 861 (2d Cir. 1960), Auten v. Auten, 308 N.Y. 155, 124 N.E.2d 99 (1954). See EHRENZWEIG, *supra* note 1 at §174. See Rubin v. Irving Trust Co., 305 N.Y. 288, 305, 113 N.E.2d 424, 431 (1953) (for a preliminary analysis of the theory).

10. Barber Co. v. Hughes, 223 Ind. 570, 63 N.E.2d 417, 423 (1945). See generally, HARPER AND TAINTER, CASES OF CONFLICT OF LAWS, 173, 175 (1937).

11. 308 N.Y. 155, 124 N.E.2d 99 (1954).

12. 276 F.2d 861 (2d Cir. 1960).

13. 308 N.Y. 155, 124 N.E.2d 99 (1954).

a grouping of the significant contacts that the validity of the contract and its provisions is controlled by the law of the forum, which includes its public policy as legislatively expressed."[14]

Thus the "center of gravity" or the "grouping of contacts" theory became the fourth rule used in determining the validity of a contract under conflicting laws.

In the present case,[15] the South Carolina Supreme Court relied heavily upon *Zogg*. In reaching its decision, the court placed particular emphasis on the significant contacts involved, such as (1) the residence of the plaintiff at the time of application for the policy, (2) the place of delivery, (3) the point from which the premiums were mailed and (4) the place where the injury occurred. These facts, coupled with the state's manifest governmental interest in protecting the rights of its citizens justified subjecting the contract to South Carolina law.

The "center of gravity" or the "grouping of contacts" theory has not been without criticism.[16] It has been said to have a contact counting rather than a contact evaluation purpose,[17] affording little certainty or guidance for the courts and involving great differences of opinions as to the most significant contacts.[18] However, the theory has brought a much needed flexibility into this area. Any mechanical rule radically restricts the range of facts pertinent to its application and only in problems susceptible of mechanical disposition is its employment justified.[19] Rather than basing results on rigid legal concepts such as place of contracting, place of performance, or intention of the parties, the transaction should be governed by the laws of the state with which it is most intimately connected in terms of the closeness of the actual

14. *Supra* note 13, at 864.
15. Johnston v. Commercial Travelers Mut. Acc. Ass'n, ____ S.C. ____, 131 S.E.2d 91, 94-95 (1963).
16. EHRENZWEIG, CONFLICT OF LAWS, §174 (1962); Kramer, *Interests and Policy Clashes in Conflict of Laws*, 13 RUTGERS L.REV. 523, 546 (1959); see Currie, *Conflict, Crisis and Confusion in New York*, 1963 DUKE L.J. 1, 39-52. Professor Currie, in a critical analysis of the center of gravity theory distinguishes between this theory and that of governmental interest anaylsis, the latter advocated by him.
17. Weintraub, *The Contracts Proposals of the Second Restatement of Conflict of Laws—A Critique*, 46 IOWA L.REV. 713, 724 (1961).
18. LEFLAR, *op cit. supra* note 4, at §125.
19. Cavers, *A Critique of the Choice-of-Law Problems*, 45 HARV.L. REV. 173, 192 (1926).

contacts between that state and the significant acts of the parties.[20]

Two other aspects of the present case remain to be considered. The first relates to the general effect of *Johnston* as to the validity of contracts in conflict cases in South Carolina. The contract in question was an "adhesion"[21] contract; that is, an agreement in which one party's participation consists in his mere adherence to a document drafted unilaterally[22] (usually by a large enterprise). The present decision could be part of a trend to apply the forum law in adhesion contracts, due to the unequal bargaining power of the adherent and the desire of the courts to protect him.[23]

It is submitted that the "center of gravity" theory as adopted by the court in *Johnston* should not be confined to the insurance field, but should be extended to other contract cases in which a grouping of the significant contacts reflects a state's governmental interest in the outcome of the litigation.

The second aspect deserving mention is that of the absence of any constitutional issues in the present case. Query - had the insured been a resident of another state at the time he purchased the policy, would the application of the forum law violate the constitutional requirements of due process or full faith and credit? A case involving a similar fact situation is now on appeal to the Supreme Court of the United States.[24] The action involved a personal property floater policy taken out by the plaintiff in Illinois. The plaintiff later moved to Florida where the loss occurred. The policy contained a suit clause which provided that no action could be maintained unless commenced within twelve months after discovery of loss. This provision, though valid in Illinois, was invalid in Florida. The Fifth Circuit Court of Appeals held that constitutional due process requirements precluded Florida from applying its law to the contract purchased in Illinois. In the first appeal to the Supreme Court, of particular interest is the dissenting

20. See HARPER AND TAINTOR, CASES ON CONFLICT OF LAWS, §6 (1937).
21. This term was apparently used in this country for the first time by Patterson, *The Delivery of a Life Insurance Policy*, 33 HARV.L. REV. 198, 222 (1919).
22. See EHRENZWEIG, *op. cit. supra* note 16, at 454-458; WEINTRAUB, *supra* note 17, at 715.
23. See LENHOFF, *op. cit. supra* note 5, 551-552.
24. Sun Ins. Office Ltd. v. Clay, 319 F.2d 505 (5th Cir. 1963). Petition for cert. filed, 32 U.S.L. WEEK 3103 (U.S. Sept. 16, 1963) (No. 470).

opinion[25] by Justice Black which leads one to the conclusion that if the case appears again before the Supreme Court, Florida law might be constitutionally applied. At the present, however, the question remains open.

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25. Clay v. Sun Ins. Office Ltd., 363 U.S. 207, 213, 4 L.E.2d 1170, 1176 (1960). The Court, in hearing the case originally, remanded to the Circuit Court for disposition of non-constitutional questions.

ADMIRALTY AND WORKMEN'S COMPENSATION — CONCURRENT FEDERAL AND STATE COVERAGE FOR AMPHIBIOUS WORKERS

Calbeck v. Travelers Ins. Co. (U.S.S.Ct. 1962)

Two workers were injured while engaged in the construction of barges located in navigable waters. In both cases the deputy commissioner awarded compensation under the federal Longshoremen's and Harbor Worker's Act [1] and the awards were affirmed by the respective district courts.[2] The Court of Appeals for the Fifth Circuit reversed[3] and the cases were consolidated when the United States Supreme Court granted certiorari.[4] HELD: In a six to two opinion[5] by Mr. Justice Brennan, the Court reinstated the decisions of the district courts and determined that Section 3(a) of the Act[6] means that federal compensation is provided for all injuries sustained by employees on navigable waters "whether or not a particular injury might also be . . . within the constitutional reach of a state workmen's compensation law." *Travelers Ins. Co. v. Calbeck*, 370 U.S. 114, 117, 8 L.Ed.2d 368, 371 (1962).

This decision is a departure from the former policy of the courts and the Congress in marking the respective jurisdictions of the federal and state compensation laws. To fully understand the importance of the decision, the history of workmen's compensation on navigable waters must be examined.

1. 44 Stat. 1424 (1927), as amended, 33 U.S.C.A. §§901-50 (1958) (constitutionality upheld in Crowell v. Benson, 285 U.S. 22, 76 L.Ed. 598 (1932)).

2. Neither the decisions of the deputy commissioners nor those of the district courts appear to have been reported.

3. Avondale Shipyards, Inc. v. Donovan, 293 F.2d 51 (5th Cir. 1961); Travelers Ins. Co. v. Calbeck, 293 F.2d 52 (5th Cir. 1961); 50 CALIF.L.REV. 342 (1962); 36 TULANE L.REV. 843 (1962).

4. Calbeck v. Travelers Ins. Co., 368 U.S. 946, 7 L.Ed.2d 342 (1961).

5. Mr. Justice Stewart and Mr. Justice Harlan dissented; Mr. Justice Franfurter took no part in the decision.

6. Section 3(a) of the act, 44 Stat. 1424 (1927), 33 U.S.C.A. §903(a) (1958) reads in part:

> (a) Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law.

Compensation for land-based workers injured on navigable waters was permitted under state workmen's compensation laws by both state[7] and federal[8] courts until 1917. In that year, the United States Supreme Court held, in *Southern Pac. Co. v. Jensen*[9] that since the Constitution extends the judicial power of the United States to all cases of admiralty and maritime jurisdiction,[10] and gives the Congress the power to determine substantive maritime law,[11] state workmen's compensation statutes could not be applied to injuries on navigable waters. Any other interpretation would substantially interfere with the constitutionally desired uniformity of admiralty and maritime laws.

Public opinion was generally in favor of coverage for all workers under workmen's compensation laws. In view of this, the Congress twice enacted legislation which sought to avoid the effect of *Jensen*.[12] The attempts were of no avail; both acts were subsequently held unconstitutional.[13]

While the Congress fathomed the depths of maritime law seeking relief for injured workers, the Court busied itself developing a remedy consistent with *Jensen;* a troublesome "maritime but local" doctrine began to arise.[14] The theory behind this doctrine was that uniformity of maritime law was the purpose of *Jensen* and that there were certain activities which, though maritime, were so local as to have little effect on the general maritime law. In *Grant-Smith-Porter Co. v. Rohde,*[15] it was held that the employment of workers in the construction of a vessel floating in navigable water was local in scope and that an application of the state workmen's compensation law would not interfere with the uniform administration of the maritime law.[16] This "maritime but local"

7. Kennerson v. Thames Towboat Co., 89 Conn. 367, 94 Atl. 372 (1915); Lindstrom v. Mutual S.S. Co., 132 Minn. 328, 156 N.W. 669 (1916); see generally, Annot. 25 A.L.R. 1029 (1923).

8. Riegel v. Higgins, 241 Fed. 718 (N.D.Cal. 1917); Berton v. Tietjen & Lang Dry Dock Co., 219 Fed. 763 (D.N.J. 1915); see generally, Annot. 25 A.L.R. 1029 (1923).

9. 244 U.S. 205, 61 L.Ed. 1086 (1917).

10. U.S. Const. art. III §2.

11. U.S. Const. art. I §8 cl. 18.

12. Act of Oct. 6, 1917, ch. 97, 1, 40 Stat. 395; Act of June 10, 1922, ch. 216, 1, 42 Stat. 634.

13. Washington v. W. C. Dawson & Co., 264 U.S. 219, 68 L.Ed. 646 (1924); Knickerbocker Ice Co. v. Stewart, 253 U.S. 149, 64 L.Ed. 834 (1920).

14. Western Fruit Co. v. Garcia, 257 U.S. 233, 66 L.Ed. 210 (1921).

15. 257 U.S. 469, 66 L.Ed. 321 (1921).

16. It should be noted that the facts of Grant-Smith-Porter are almost identical with those of the instant case.

doctrine brought about an *ad hoc* administration of cases and the lack of uniformity caused great difficulty in the administration of the state compensation statutes.

In 1927 a federal workmen's compensation act for maritime workers was passed.[17] This act is generally considered, in addition to providing a federal source of compensation, to have codified the "maritime but local" criterion as to the applicability of state acts.[18] It is arguable that the doctrine should have ended with the enactment of a federal workmen's compensation law, but it did not. The *ad hoc* approach to jurisdiction remained detrimental to the worker seeking remedy. One of the principal reasons for the enactment of workmen's compensation laws was to provide a speedy source of relief for injured workers. When each case must be decided on its merits as to jurisdiction, the workers are faced with lengthy and complicated litigation before recovery can be effected. In addition, if the worker were to choose the wrong jurisdiction, he might find himself out of court due to the running of the customarily short statutes of limitations prevalent in compensation statutes. Employers as well as employees had problems: they had no way of knowing whether to insure under the state or federal statute. The usual solution was dual coverage.

The stormy career of the "maritime but local" doctrine was modified when Mr. Justice Black, in *Davis v. Department of Labor & Indus.*[19] created the "twilight zone." This term referred to those cases in which counsel could not predict the proper forum for the action; a presumption was created that, in such cases, counsel's choice was correct. The Court subsequently decided that the "twilight zone" was very broad.[20] Thus, the worker could elect either a federal or a state remedy. If a remedy under the state compensation act were elected, the application of such relief would be presumed constitutional.[21] Further, if federal administrative relief were sought,

17. 44 Stat. 1424 (1927), as amended, 33 U.S.C.A. §§901-50 (1958).
18. GILMORE & BLACK, ADMIRALTY, 346 (1957); 2 LARSON, WORKMEN'S COMPENSATION LAW, §§89.00-.22 (1962).
19. 317 U.S. 249, 87 L.Ed. 246 (1942).
20. Baskin v. Industrial Acc. Comm'n, 338 U.S. 854, 94 L.Ed. 523 (1949) (per curiam).
21. Thus it is reversible error for a court to deny compensation for an injury which fell in the "twilight zone." *Id.*

the decision — right or wrong — would be granted administrative finality.[22]

The "twilight zone" greatly aided the injured worker, but the question of the extent of its broadness caused trouble; the extent of the broadness of the zone remained to be determined in each case just as it had been necessary in each case to determine what constituted "maritime but local."[23] The most usual statement of the extent of the zone was that it included all waterfront injuries in which there was a reasonable doubt as to the applicable compensation statute.[24]

When the instant case was decided, the law was generally said to be:

> ... (1) that whenever enough doubt existed as to whether federal or state acts applied and a rational argument could be made for either, the employee had a choice of remedies; (2) the choice was to be respected by administrators and courts regardless of previous "maritime but local" cases holding that this particular job was in the other area; and (3) employers had better insure any employee who worked for any length of time on both land and water (amphibious worker) under both federal and state acts.[25]

The decision of the Fifth Circuit Court of Appeals in the instant case[26] seemed to be well reasoned. In the light of an earlier decision,[27] the case was one clearly characterized as "maritime but local" and therefore was not within the "twilight zone." The decisions below which granted and affirmed relief seemed clearly reversible.

However, the United States Supreme Court, after studying the legislative history of the act, determined that Congress intended that the Act should furnish compensation to *all* workers injured on navigable waters. The *Jensen* case had

22. Rodes, *Workmen's Compensation for Maritime Employees*, 68 HARV.L.REV. 637 (1955).
23. It should be noted that in Davis v. Department of Labor & Indus., *supra* n. 19, the suggestion is quite clear that (contrary to Southern Pac. Co. v. Jensen, *supra* n. 9) the state and federal remedies are not mutually exclusive.
24. See Hahn v. Ross Island Sand & Gravel Co., 358 U.S. 272, 3 L.Ed.2d 292 (1959).
25. Note, 48 CORNELL L.Q. 532, 537 (1963).
26. Avondale Shipyards Inc. v. Donovan, 293 F.2d 51 (5th Cir. 1961); Travelers Ins. Co. v. Calbeck, 293 F.2d 52 (5th Cir. 1961).
27. Grant-Smith-Porter v. Rohde, 257 U.S. 469, 66 L.Ed. 321 (1922).

indicated that states could not apply their acts to navigable waters. Subsequent decisions brought about the "maritime but local" doctrine as an exception. The original wording of the statute excluded employment ". . . of local concern."[28] Therefore, the substituted phrase in Section 3(a), ". . . if recovery . . . may not validly be provided by a state law" is not the same as "maritime but local" but merely means that the federal act did not extend beyond the limits set out in *Jensen*.[29] The opinion of the Court was that Congress had intended by Section 3(a) to provide recovery without expensive and time-consuming litigation over what constitutes "maritime but local." Such a conclusion does not seem warranted by the legislative history of the Longshoremen's and Harbor Worker's Act.[30]

This interpretation produces an anomaly; the Court did not expressly overrule any of the previous cases dealing with "maritime but local" or the "twilight zone." But, if the "maritime but local" doctrine was not incorporated in the Act, as had previously been thought,[31] then there is no reason to continue the application of the doctrine. Accordingly, the "twilight zone" has no further reason for existence: its sole purpose was to avoid the dilemma caused by the "maritime but local" doctrine.[32]

This failure to undermine the extension to local jurisdiction of maritime cases does not seem to cause any appreciable degree of non-uniformity to the maritime and admiralty law: *Jensen* is still viable. In its narrowest sense, the *Jensen* case only prohibited state compensation to longshoremen injured on navigable waters.[33] Workers now seem to have a choice with no chance that their remedy will be precluded. If the injury occurs on land, the state act will clearly provide a remedy; if the injury occurs on navigable water, the worker

28. *Hearings on S. 8170 Before Senate Judiciary Committee*, 69th Cong., 1st Sess. 2 (1926).
29. Calbeck v. Travelers Ins. Co., 370 U.S. 114, 124-126, 8 L.Ed.2d 368, 375-376 (1962).
30. Note, 1963 DUKE L.J. 327, n. 17.
31. GILMORE & BLACK, *op. cit. supra* note 18, at 346; 2 LARSON, *op. cit. supra* note 18, at §§89.00-.22.
32. *But see* Matherne v. Superior Oil Co., 207 F. Supp. 591 (E.D.La. 1962) and Holland v. Harrison Bros. Dry Dock & Repair Co., 306 F.2d 369 (5th Cir. 1962) where the court paid lip-service to the "twilight zone" despite the decision in the instant case.
33. See Pennsylvania R.R. v. O'Rourke, 344 U.S. 334, 337, 97 L.Ed. 367, 371 (1953) (dictum); Noah v. Liberty Mut. Ins. Co., 267 F.2d 218, (1959) *overruling on rehearing en banc*, 265 F.2d 547 (5th Cir. 1959).

will clearly be able to invoke the federal remedy and will probably be able to seek recovery under the state laws if the injury was incurred within the "twilight zone."[34] In the final analysis, the rule seems to be that the federal act is applicable whether or not the state act might be constitutional.

Such a clarification serves to eliminate a doubtful area in the administration of admiralty and maritime laws as they relate to the applicability of various compensation acts for maritime workers. Consequently, the workers are given the benefit of the federal statute without depriving them of the right to seek redress in the state courts if it is available.

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34. It is unlikely, except in a few cases, that workers will choose the state act if the federal act is available; in all but those few cases, the federal benefits are more advantageous. See U.S.DEPT. OF LABOR BULL. No. 161, 10-38 (1961 Supp.). See also 2 LARSON, WORKMEN'S COMPENSATION LAW at 524-58 (App. B) (1962).

CONSTITUTIONAL LAW — ABRIDGEMENT OF RELIGIOUS FREEDOM — DENIAL OF UNEMPLOYMENT COMPENSATION TO SEVENTH-DAY ADVENTIST REFUSING SATURDAY WORK

Sherbert v. Verner (U.S. 1963)

Appellant, a Seventh-Day Adventist, was discharged by her employer for her refusal to work on Saturday, the Sabbath Day of her faith, and was refused unemployment compensation by the South Carolina Employment Security Commission on the ground that she was not available for work and had rejected suitable work without good cause. The Court of Common Pleas sustained the Commission and the South Carolina Supreme Court affirmed[1] holding that disqualifying appellant did not restrict her religious freedom. On appeal, the United States Supreme Court reversed, holding that to deny compensation to appellant because she refused to work on her Sabbath restricted the free exercise of her religion, that there was no compelling state interest to justify the restriction, and that the extension of unemployment benefits to Sabbatarians in common with Sunday worshippers did not foster the establishment of the Seventh-Day Adventist religion in South Carolina. *Sherbert v. Verner*, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963).

The first amendment freedoms, including that of religion, apply to states as well as to the federal government by reason of the due process clause of the fourteenth amendment,[2] and neither the state nor the federal government can pass laws which aid one religion, aid all religions, or prefer one religion over another; neither can force or influence a person to go to or remain away from church against his will.[3] The constitutional guaranty of freedom of religion applies to all kinds or forms of government action whether taken by the state legislature or state judiciary.[4] The free exercise clause of the first amendment forbids any govern-

1. Sherbert v. Verner, 240 S.C. 286, 125 S.E.2d 737 (1962).
2. Cantwell v. Connecticut, 310 U.S. 296, 84 L.Ed. 1213, 128 A.L.R. 1352 (1940).
3. Everson v. Board of Educ., 330 U.S. 1, 91 L.Ed. 711, 168 A.L.R. 1392 (1947).
4. Kreshik v. St. Nicholas Cathedral, 363 U.S. 190, 4 L.Ed.2d 1140 (1960).

ment regulation of religious beliefs as such.[5] However, an incidental burden upon one's constitutional liberties, including that of religion, may be justified by a compelling state interest in the regulation of a subject within the state's constitutional power to regulate.[6]

The two primary issues before the Court were whether or not appellant's free exercise of religion had been infringed upon, and if so, was there any compelling state interest to justify the infringement.

The view of the majority opinion was that the South Carolina Court's ruling forced appellant to choose between following the precepts of her religion and forfeiting benefits on the one hand, and abandoning one of the precepts of her religion in order to be eligible for work on the other. The ruling put pressure on appellant to forego the practice of observing Saturday as a day of rest as her religion required. This was held to be an infringement of appellant's free exercise of religion even though the burden imposed was concededly incidental and indirect. A law which impedes observance of one or all religions, or discriminates invidiously between religions, is constitutionally invalid, even though the burden may be characterized as being only indirect.[7] As to the contention that unemployment benefits were not appellant's "right" but merely a "privilege," the Court felt that the ruling conditioned the availability of benefits upon appellant's willingness to violate a principle of her religious faith. Regardless of their purpose, conditions on public benefits cannot be sustained if they inhibit or deter the exercise of first amendment freedoms.[8] No state may exclude any individual from receiving the benefits of public welfare legislation because of his faith or lack of it.[9]

In the dissenting opinion,[10] it was argued that, since the statute was designed to compensate persons involuntarily unemployed due to the inability of industry to provide them a job, the appellant, who had voluntarily withdrawn from the labor market because of personal considerations, was not

5. Cantwell v. Connecticut, *supra* note 2.
6. Braunfield v. Brown, 366 U.S. 600, 6 L.Ed.2d 563 (1961); *Cf.* NAACP v. Button, 371 U.S. 415, 9 L.Ed.2d 405 (1962).
7. Braunfield v. Brown, *supra* note 6.
8. Speiser v. Randall, 357 U.S. 513, 2 L.Ed.2d 1460 (1958).
9. Everson v. Board of Educ., *supra* note 3.
10. Sherbert v. Verner, — U.S. —, 10 L.Ed.2d 968, 979 (1963).

"involuntarily unemployed." It was felt that appellant's religious convictions were wholly without relevance to the state court's application of the law and that appellant was denied compensation not because of her religion but because she was not "available for work" within the meaning of the statute. The weakness of this argument lies in the fact that in filing her claim, appellant, a millworker, had expressed a willingness to accept work, even in another industry, so long as Saturday work was not required. Had appellant been willing to work only in the mills, all of which operated six days per week, it might be justifiable to say she had removed herself from the labor market.

Even though infringement of one's free exercise of religion is found, the action may be sustained if some compelling state interest is shown as justification. The Court cited *Thomas v. Collins*[11] in which the requirements for such justifying interest are set out. The mere showing of a rational relationship to some colorable state interest will not suffice. It is only the gravest abuses, abuses which seriously endanger paramount interests that will give occasion for permissible limitation. In the instant case, the Court found no such abuses.

Appellees suggested that the possibility of the filing of fraudulent claims by claimants feigning religious objection to Saturday work might not only deplete the unemployment compensation funds, but also hinder the scheduling by employers of necessary Saturday work. The Court refused ruling on this point since it had not been raised in the South Carolina Court. By way of dictum, however, the Court indicated that possible depletion of funds and inconvenience to employers would not be sufficient grounds to justify a substantial infringement of religious liberties. Granting benefits in cases such as the one under consideration would not disrupt the entire system of unemployment compensation. In such cases[12] other states have granted compensation without serious complications. In addition, the present record indicated that out of the one hundred and fifty Seventh-Day Adventists living in appellant's area, only two were un-

11. 323 U.S. 516, 89 L.Ed. 430 (1945).
12. *E.g. In re* Miller, 243 N.C. 509, 91 S.E.2d 241 (1956); Swenson v. Michigan Employment Sec. Comm., 340 Mich. 430, 65 N.W.2d 709 (1954); Tary v. Board of Review, 161 Ohio 251, 119 N.E.2d 56 (1954).

employed.[13] Furthermore, the opportunities to defraud the state in order to obtain the benefits could be checked, at least in the sense of taking periodically compensated rests. Such checks could take the form of state inquiry into the sincerity of one's religious beliefs or the requirement that a claimant make himself available for another type work, not conflicting with his religious convictions before allowing him to receive compensation benefits.[14]

Mr. Justice Stewart, who concurred in result only, and the dissenting Justices criticized the case on two points: that the present holding was in conflict with the holding of *Braunfield v. Brown*[15] and that the holding was inconsistent with prior cases dealing with the establishment clause of the first amendment.

In *Braunfield,* an orthodox Jew attacked the validity of a Sunday Closing Law alleging that his religion required him to close on Saturday and that he would not be able to continue in business unless he was allowed to open on Sunday. The Court recognized that the statute would make the practice of his religion more expensive, but held that the secular objective (the compelling state interest) of providing a uniform day of rest for all workers overcame this fact. In the instant case, the Court took notice of the fact that other states found ways to compensate Seventh-Day Adventists in appellant's situation, but in *Braunfield* they ignored the factor that twenty-one out of thirty-four states having Sunday Laws at the time provided exceptions for Sabbatarians,[16] and held that the secular objective could be achieved in no other practical way. The Court stated "if the state regulates conduct by enacting within its power general law whose purpose and effect is to advance the state's secular goals, the statute is valid despite its indirect burden on religious observance, unless a state may accomplish its purpose by means which do not impose such a burden."[17] The secular objective of the state here is much clearer than in *Braunfield* as it must be admitted that the Sunday Laws, whatever their present purpose, were originally religiously

13. Sherbert v. Verner, __ U.S. __, 10 L.Ed.2d 968, n. 2.
14. United States v. Ballard, 322 U.S. 78, 88 L.Ed. 1148 (1944).
15. Braunfield v. Brown, *supra* note 6.
16. *Id.* at 614, 6 L.Ed.2d at 573.
17. *Id.* at 607, 6 L.Ed.2d at 568.

motivated. Also the financial burden and the pressure imposed upon religious practices seem less here than in *Braunfield* for that case involved a criminal statute while here the most that appellant could lose would be twenty-two weeks of unemployment benefits. Finally, in *Braunfield* it was thought that the "compelling state interest" could not otherwise be achieved practically because to make an exemption would require a case by case inquiry into religious beliefs, resulting in higher administrative and police costs. It may be pointed out that here also a case by case inquiry is likely to be required with resulting higher administrative and investigative costs. The dissenting Justices, while not agreeing explicitly with *Braunfield,* left no doubt that they thought that the instant case overruled *Braunfield* despite the Court's attempt to distinguish it.

Justice Stewart, concurring in result, and the dissenters felt that the holding here conflicted with the Court's prior decisions interpreting the establishment clause, because that clause as priorly construed forbids the financial support of government to be placed behind a particular religious belief.[18] The effect of this decision will be that South Carolina will be required to single out an individual and pay him compensation when his refusal to work is based solely on religious convictions. Thus the state is compelled to give special treatment to those of a particular religious faith. The majority felt that its holding represented only "neutrality in the face of religious differences" and that it did not foster the establishment of religion in South Carolina. This view is not supported by logic for appellant will be paid compensation *because* of her religion. The result is a conflict between the establishment clause and the free exercise clause. Such conflicts are inevitable. Here the Supreme Court had a chance to clear up some of the confusion resulting from conflicts between these two clauses, but it failed to do so. Because of this confusion and because this case renders the authority of *Braunfield* at least uncertain, more litigation can be expected in this area should analogous situations arise in the future.

Undoubtably the effect of the decision will be that South Carolina will have to pay compensation to claimants in ap-

18. Engel v. Vitale, 370 U.S. 421, 8 L.Ed.2d 601, 86 A.L.R.2d 1285 (1962).

pellant's position, but the theory under which the state will proceed remains to be seen. There seem to be two choices open. South Carolina can either stand on the constitutional ground as decided in the present case, or it may reinterpret its statute in accordance with the views of other states that have faced the problem.[19] The latter choice would require South Carolina to adopt a view rejected by all but one of its justices,[20] but this is the better choice. It would bring South Carolina into line with the other jurisdictions, and since the statutes are practically uniform, the interpretations of other courts could furnish a guide for the South Carolina courts.

WILBURN BREWER, JR.

19. Cases cited note 12, *supra*.
20. Sherbert v. Verner, *supra* note 10, dissenting opinion.

TORTS — CONTRIBUTION — INTERSPOUSAL IMMUNITY DOES NOT PRECLUDE CONTRIBUTION WHERE ONE SPOUSE IS JOINT TORTFEASOR[1]

Bedell v. Reagan (Me. 1963)

Plaintiffs, who were husband and wife, instituted an action against defendant for injuries and consequential losses sustained in an automobile collision in which the wife was a passenger in an automobile driven and owned by the husband. Defendant was the driver and owner of the automobile which collided with that of the husband. Defendant denied liability and filed a third party complaint against the husband alleging that the collision was due to the negligence of the husband. The third party complaint charged the husband with an obligation to contribute or indemnify for damages sustained as a result of the wife's action against the defendant. The Superior Court granted the husband's motion to dismiss the defendant's third party complaint for contribution. The Supreme Judicial Court of Maine overruled the motion and remanded the case on the ground that even though husband and wife as reciprocal spouses could not maintain causes of action one against the other for negligent torts, the defendant could maintain a third party complaint against the husband for contribution based on the participating or joint negligence of the husband which resulted in injury to the wife. *Bedell v. Reagan*, 192 A.2d 24 (1963).

It is settled in Maine that a husband and wife may not sue each other for negligent torts.[2] It is also settled in Maine that there may be contribution between negligent joint tortfeasors.[3] Consequently, a situation in which one joint tortfeasor is the spouse of the injured party presents an irreconciliable problem. The present court maintained that there is greater justice in equitably distributing liability for negligent conduct than in preserving a marital union which has only a probability of being disrupted as a result of a suit for

1. For an excellent coverage of the cases in this area see Annot., 19 A.L.R.2d 100 (1957) and Annot., 60 A.L.R.2d 1385 (1958).
2. Anthony v. Anthony, 135 Me. 54, 188 Atl. 724 (1937).
3. Hobbs v. Hurley, 117 Me. 449, 104 Atl. 815 (1918).

contribution. This is a minority view[4] followed by only one other state.[5]

The prevailing view is that contribution depends on the common liability of the joint tortfeasors to the injured party. Thus, where one tortfeasor is not liable to the injured party because he or she is the spouse of the injured party[6] or because a parent-child relation exists,[7] the right to contribution does not exist. This concept of a common liability has also precluded contribution where the injured party has assumed the risk of injury as to one tortfeasor, but has not assumed the risk of injury as to the other tortfeasor.[8] The right to contribution is deemed derivative and does not create a new cause of action.[9] Therefore, if one tortfeasor is not liable to the injured party, the other tortfeasor does not acquire any right of action from the injured party by assuming complete liability for the damages. The Minnesota court[10] reasoned that common liability was essential since contribution was actually compensation given in equity for removing the burden of liability of one tortfeasor by another. When no common burden exists, no compensation should be given.

The minority view, as expressed in the Pennsylvania case of *Fisher v. Diehl*,[11] attacks the argument of the majority, that to permit contribution would, in effect, allow one spouse to recover from the other. A judgment against a negligent spouse by the joint tortfeasor is not enforceable by the injured spouse nor does it enure to that spouse's benefit. It is simply a judgment enuring to the benefit of the joint tortfeasor. The marital relation of the injured party and one of the tortfeasors should not destroy the substantive

4. Yellow Cab Co. of D.C. v. Dreslin, 181 F.2d 626 (D.C. Cir. 1950); Ackerson v. Kibler, 138 Misc. 695, 246 N.Y.S. 580, *aff'd* 232 App. Div. 306, 249 N.Y.S. 629 (1939); Scruggs v. Meredith, 135 F. Supp. 376 (D.C. Hawaii 1955); Rogers v. Galindo, 68 N.M. 215, 360 P.2d 400 (1961); American Auto Ins. Co. v. Molling, 239 Minn. 74, 57 N.W.2d 847 (1953); Ennis v. Donovan, 222 Md. 536, 161 A.2d 648 (1960); Kenedy v. Camp, 14 N.J. 390, 102 A.2d 595 (1954); In Reed v. Stone, 176 F. Supp. 463 (1959), the District Court of Maine held, in applying Maine law, that the negligent spouse was not liable for contribution since there was no common liability of both the tortfeasors to the injured party. The present court surprisingly fails to mention this case.
5. Fisher v. Diehl, 156 Pa. Super. 476, 40 A.2d 912 (1945).
6. Yellow Cab Co. of D.C. v. Dreslin, *supra* note 4.
7. Zutter v. O'Connell, 200 Wisc. 601, 229 N.W. 74 (1930).
8. Kauth v. Landsverk, 225 Wis. 254, 271 N.W. 841 (1937).
9. Ennis v. Donovan, *supra* note 4.
10. American Auto Ins. Co. v. Molling, *supra* note 4.
11. Fisher v. Diehl, *supra* note 5.

rights of outsiders. The common law fiction of the legal unity of husband and wife and the pragmatic argument of preserving domestic harmony and felicity are not applicable where injustice is produced upon third parties. To hold otherwise would permit a spouse to profit by his wrongful or negligent conduct. The majority,[12] however, believe that a spouse will not profit by his own wrong since any recovery would be the separate property of the injured spouse.

The minority view is theoretically the better, while the majority view is the more realistic. It has been said that "as jurisprudence becomes emancipated from the notion that liability in tort is largely penal in character, the principle of contribution may become extended rather than restricted."[13] This is the direction in which the Maine court is moving. Its basis is analogous to that of the doctrine of comparative negligence by which a plaintiff who is contributorily negligent may still recover from a defendant who is also negligent, but to a greater degree. Despite the equity which is produced by this view, it fails to consider the practical effect of recovery by contribution from a husband for his joint negligence in injuring his wife. Will a wife sue at all knowing that her husband might be liable for a part of her damages? If a wife does sue against her husband's wishes, will their marriage be disrupted? When considered in light of these questions, the present decision will not produce greater justice. The substantive right of a spouse to sue is as important as the right of the third party to incur no more liability than is just. In fact, the right of the spouse might be greater since she or he is completely innocent, while the third party is at least partially at fault. Permitting a third party joint tortfeasor to recover contribution from a joint tortfeasor spouse makes the injured spouse reluctant to sue for fear that the marriage will be disrupted.

Despite the practical deficiency of the present decision, the tendency in this area is towards a more theoretical application of the law. More courts are beginning to accept contribution among negligent joint tortfeasors,[14] and many

12. Rogers v. Galindo, *supra* note 4.
13. HARPER & JAMES, THE LAW OF TORTS 717 (1st ed. 1956).
14. PROSSER, THE LAW OF TORTS 249 (2d ed. 1955); see also, HARPER & JAMES, op. cit. *supra* note 13, pp. 715-717.

statutes have been passed which adopt the comparative negligence theory of apportioning damages. Consequently, even though it might be more practical to deny a defendant the right to contribution from a spouse of the injured party, there is the growing realization that liability should be imposed in an exact correlation to the fault of the defendant. It is submitted that if a means is established to measure the fault of a person, the doctrine of contribution might be abolished entirely, thereby allowing an injured party to recover from each tortfeasor only the damage which he has caused.

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